Supreme Court, U.S.
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No. 98-80

In The

Supreme Court of the United States

October Term, 1997

J. ST. GIRARD JORDAN,

Petitioner,

vs.

SMITHKLINE BEECHAM, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly held that claims brought in 1995 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and under the Civil Rights Act of 1866, 42 U.S.C. § 1981, were untimely where the petitioner (1) voluntarily left the respondent's employ in 1989; and (2) knew or should have known in 1989 of all of his purported injuries, and indeed of the critical facts which he now proffers to support his claims.

RULE 29.6 STATEMENT

SmithKline Beecham Corporation, incorrectly designated in the caption as SmithKline Beecham, Inc., is a wholly owned subsidiary of SmithKline Beecham p.l.c. SmithKline Beecham Corporation has the following non-wholly owned subsidiaries: Smith Kline & French of Pakistan, Ltd.; Franklintown Corporation; and SmithKline Beecham Consumer Healthcare L.P.

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STATEMENT OF THE CASE

The undisputed facts and procedural history of this case are set forth in the Opinions by The United States Court of Appeals for the Third Circuit (Attached as Appendix A to the Petition for Writ of Certiorari ("Pet. App.")) and The United States District Court for the Eastern District of Pennsylvania, 958 F. Supp. 1012 (E.D. Pa. 1997) (Buckwalter, J.), (Attached as Appendix B to the Petition for Writ of Certiorari).

In sum, petitioner seeks review of the lower courts' determination that petitioner's employment discrimination claims were untimely. The petitioner submitted his resignation from his employment with SmithKline Beecham Corporation ("SmithKline Beecham" or the "Company")) in 1988 and actually left the Company's employ in 1989. In 1993 petitioner filed a breach of contract action in state court seeking the value of certain stock options which were issued to other employees, but not to petitioner, in 1989 after petitioner had submitted his resignation. In 1995 petitioner filed statutory claims of race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 42 U.S.C. § 1981, and under the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 955(a) (hereinafter referred to as the "discrimination claims"). Petitioner claims that in 1995 he learned of the existence of a January 1989 resolution of the Company's Board of Directors which apparently caused petitioner to believe that other employees were treated differently than petitioner in 1989. Petitioner contended that if he had known about the Board resolution earlier, he might have revoked his resignation, and thus been eligible for the stock options which certain

other employees who stayed with the Company received. The only purported injuries which plaintiff identified in his discrimination claims were the non-receipt of the 1989 stock options, and the loss of his job.

The District Court and a unanimous panel of the United States Court of Appeals for the Third Circuit ruled that petitioner's discrimination claims were untimely and the discovery rule did not apply to extend the time limits for filing such claims. The lower courts reasoned that the discovery rule did not apply because petitioner knew or should have known of all of his purported injuries in 1989, when he left SmithKline Beecham's employment. Moreover, the lower courts pointed out that petitioner admitted in his deposition that he should have seen a memorandum circulated to all corporate staff employees in April 1989, which set forth the substance of the January 1989 Board resolution. Therefore, not only did petitioner know of his purported injuries in 1989, but he also knew or should have known in 1989 of the critical facts, *i.e.*, the contents of the January 1989 Board resolution – which he claimed in his 1995 discrimination claims to have been intentionally withheld from him because of his race.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari is untimely. In addition, nothing in the petition merits review by this Court under Supreme Court Rule 10. Although petitioner contends that the Third Circuit's decision conflicts with those of other circuits, petitioner is mistaken; there is no

circuit split on the question presented for review. Petitioner actually is asking this Court to review the lower courts' analysis of an extensive factual record, their finding that there were no disputed material facts, and their application of the law to those facts, which does not merit review by this Court. Further, petitioner's argument is based on a misstatement of the holding of the Third Circuit. The Third Circuit did not uphold summary judgment based solely on petitioner's statement that he should have seen the April 1989 office memorandum sent to all corporate staff, but rather because petitioner knew or should have known of all of his purported injuries in 1989. This was a correct application of the "discovery rule" to the undisputed material facts which is not even challenged by petitioner. Therefore, this Court should deny the petition for writ of certiorari.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE PETITION BECAUSE IT IS UNTIMELY

The Petitioner's petition for a writ of certiorari is untimely. A petition for writ of certiorari must be filed within 90 days after entry of judgment by the court below. 28 U.S.C. § 2101(c); S.Ct. R. 13. A Justice may extend this time for a period not exceeding 60 days. *Id.* These time limits for filing a petition are mandatory and jurisdictional. *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994).

The Opinion of the United States Court of Appeals for the Third Circuit was filed on February 4, 1998. The Court granted petitioner an extension of time until July 3, 1998 to file his petition. The petition was filed with this

Court on July 6, 1998, missing the Court's extended deadline. July 3, 1998 did not fall on a Saturday or a Sunday, nor was it a federal legal holiday under 5 U.S.C. § 6103(a), nor was the Court building closed by order of the Chief Justice on July 3, 1998, which would have allowed petitioner to file on Monday, July 6, 1998. *See* S.Ct. R. 30.1 Thus, the petition is untimely, and this Court does not have jurisdiction over this petition.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION

Petitioner has made a vague argument that the decision below somehow conflicts with decisions in other circuits because other circuits "have been far more favorable to plaintiffs than the Court below when reviewing summary judgments granted on statute of limitations grounds, over assertion of the 'discovery rule'." Pet. at 12. There is no disagreement among the circuits regarding the federal discovery rule or the standard for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and the lower courts in this case applied the correct rule of law.

The Third Circuit has held that under the federal discovery rule, the statute of limitations begins when the plaintiff "has discovered or, by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party's conduct." *Oshiver v. Levin*, 38 F.3d 1380, 1386 (3rd Cir. 1994). Despite his claim of conflicting circuit decisions, petitioner has not cited one case demonstrating that other circuits apply a different rule than the

one applied by the Third Circuit. In fact, petitioner himself cites a case by the Seventh Circuit that applies the same rule. *See* Pet. at 12 (citing *Sellars v. Perry*, 80 F.3d 243, 245-46 (7th Cir. 1996) (stating that under federal discovery rule, claim does not accrue until plaintiff discovers or should have discovered his "injury" and remanding case to determine when plaintiff should have known of the "injury," or his employment termination)).

Furthermore, the remainder of the cases cited in the petition are irrelevant to the question presented for review, because those circuit decisions involved the application of *state* discovery rules in non-employment discrimination contexts. *See* Pet. at 12-13 (citing *Byers v. Burleson*, 713 F.2d 856, 859-60 (D.C. Cir. 1983) (applying District of Columbia "injury rule" to determine whether legal malpractice claim was timely)); *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (D.C. Cir. 1983) (applying Utah discovery rule, which only applies in special circumstances); *Rose v. A.C. & S., Inc.*, 796 F.2d 294, 296-98 (9th Cir. 1986) (applying Washington discovery rule); *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 391-95 (8th Cir. 1986) (applying Iowa discovery rule); *Cambridge Plating Co. v. Napco, Inc.*, 991 F.2d 21, 25-27 (1st Cir. 1993) (applying Massachusetts discovery rule).

Finally, the petitioner attempts to attack the lower courts' application of the summary judgment standard, but petitioner has not identified any particular erroneous rule of law enunciated by the lower courts, let alone a rule on which there is a circuit split. On the contrary, the lower courts applied the summary judgment standards which this Court announced in *Celotex Corp. v. Catrett*, 477

U.S. 317 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). *See* Pet. App. at B11.

Thus, there is no support for petitioner's claim that there is a jurisdictional split among the circuits regarding the federal discovery rule or any other rule of law applied by the lower courts. Therefore, this Court should deny the writ of certiorari as the petition does not seek review of a federal question as to which the circuits disagree. *See* S.Ct. R. 10(a) (important consideration for certiorari is whether the court below has "rendered a decision in conflict with the decision" of another court of appeals or the highest court of a state on the same matter).

III. THE PETITION RAISES ONLY A QUESTION OF WHETHER THE COURTS BELOW ERRED IN FINDING THE MATERIAL FACTS TO BE UNDISPUTED AND THEN APPLYING APPLICABLE LAW

Petitioner argues that the lower court erred in the manner in which it analyzed the extensive factual record which was developed in the District Court and applied the "discovery rule" to those facts. This Court, however, "rarely grants" a petition for a writ of certiorari when the petition seeks review of "erroneous factual findings or the misapplication of a properly stated rule of law." S.Ct. R. 10.

The opinions of both courts below reflect a careful consideration of a voluminous factual record. The District Court, in a 30 page opinion and after critically examining

the facts, found that there was no genuine issue of material fact regarding whether petitioner knew or should have known of his purported injuries in 1989, and held that the claims were time-barred as a matter of law. Pet. App. at B24-25. The District Court based its holding on the undisputed fact that petitioner's employment with SmithKline Beecham ended in July 1989 pursuant to a voluntary resignation program. *Id.* at B3-4. In addition, it was undisputed that petitioner did not file his race discrimination claims against SmithKline Beecham until August 1995, more than six years after he resigned. *Id.* at B9-10. Nor could petitioner identify for the court any injury he learned of in 1995. *Id.* at B23. From this, the District Court found that petitioner learned of his "actual injury" for discovery rule purposes on the day he resigned from SmithKline Beecham (July 1989). *Id.* at B24. Accordingly, the District Court held that all of the discrimination claims were time-barred. *Id.* at B24-25. The District Court also pointed out that petitioner admitted in his own deposition that in 1989 he "should have seen" an April 1989 memorandum that was circulated to "All Corporate Staff" employees, including petitioner, which set forth the substance of the January 1989 Board Resolution which petitioner claimed to have been withheld from him due to his race. Thus, the District Court noted that, by his own admission, the petitioner "should have known" of the key facts alleged some six years before he filed his discrimination claims.

The Third Circuit properly affirmed the District Court's summary judgment order on the discrimination claims, agreeing with the District Court that the record

undisputedly revealed that petitioner knew of his purported injuries by July 1989, but that petitioner did not file the claims until August 1995. Pet. App. at A8-10.

Since petitioner is asking this Court solely to review the lower courts' application of a correctly stated law to the facts of this case, which this Court rarely does, this Court should deny the petition for a writ of certiorari.

IV. THE PETITION MISSTATES THE THIRD CIRCUIT'S HOLDING ON THE DISCOVERY RULE AND DOES NOT EVEN CHALLENGE ITS ACTUAL HOLDING

Petitioner asserts that the Third Circuit erred in using portions of his deposition in which he stated that he should have seen the April 1989 memorandum distributed to all corporate staff (of which petitioner is one) as evidence that his discrimination claims were time-barred as a matter of law under the federal discovery rule. *See* Petition at 11-12. However, that argument misstates the Third Circuit's holding. Indeed, petitioner does not cite to any part of the Third Circuit's opinion where this supposed error was made because the April 1989 memorandum was not the basis for the Third Circuit's ruling on the discrimination claims.

The Third Circuit did not rely on petitioner's "should have seen it" statement in upholding summary judgment as to petitioner's Title VII and § 1981 claims because under the discovery rule, the relevant date is the date when a petitioner knew or should have known of his injuries, not the date he learned of purported evidence supporting his claim that the cause of his injuries was

discrimination. *See Oshiver v. Levin*, 38 F.3d at 1391. Petitioner does not even cite the *Oshiver* decision in his petition, let alone attempt to distinguish it or argue that it is incorrect.

Rather than focusing on the April 1989 memo, in analyzing petitioner's discrimination claims the Court of Appeals applied the *Oshiver* test, and ruled that petitioner knew of his injury for discovery rule purposes no later than July 1989 when his employment with SmithKline Beecham ended. Court of Appeals Opinion at A9. Since the statute of limitations on each discrimination claim was much shorter than six years, the Third Circuit concluded that the District Court had properly granted summary judgment, as the claims were time-barred as a matter of law. *Id.* at A9-10. Thus, the Third Circuit based its order affirming summary judgment on the undisputed fact that the petitioner had actual knowledge of his purported injuries in 1989, and not that he "should have seen" the April 1989 memorandum. Petitioner does not even challenge this dispositive holding.

For this additional reason the petition should be denied.

CONCLUSION

The petition does not raise any issue which warrants review by this Court, and it was not filed within the jurisdictional time limits. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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